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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 454

LEO A. PRICE, AS RECEIVER IN EQUITY OF J. M. Gidding & Co., Inc., petitioner

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The report of the Special Master appears at pages 1 to 3 of the record. The District Court affirmed the Special Master's report without opinion. The opinion of the Circuit Court of Appeals appears at page 24 of the record and is reported in 6 Fed. (2d) 758, under the name of *Charles H. Mears* v. *J. M. Gidding & Co., Inc.* It is based on that court's opinion in *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corporation,* 6 Fed. (2d) 752. The latter case is also in this Court, *sub nomine Stripe, Receiver,* v. *United States,* No. 496.

GROUNDS OF JURISDICTION

The jurisdiction of this Court was invoked by a writ of certiorari which, on June 1, 1925, was granted under Judicial Code § 240 (a) as amended by the Act of February 13, 1925, to review a final decree, entered on May 1, 1925 (R. 25), in an equity suit pending in the Southern District of New York, where the jurisdiction depended solely on diverse citizenship. The United States intervened in that suit, claiming priority of payment of income taxes and customs duties and the claims were allowed as prior claims.

THE QUESTION INVOLVED

The sole question involved is the correctness of the decision of the court below that as against *general creditors* the United States are entitled to priority of payment of their income taxes and customs duties in a consent receivership proceeding in equity.

STATEMENT

On or about October 2, 1923, one Mears filed his bill of complaint against the Gidding Company, on behalf of himself and all other creditors, alleging in substance that the Company was indebted to him upon its promissory note; that it was unable to meet its obligations as they matured; that if its assets could be liquidated in due course of business their value would exceed its obligations; that certain of its creditors had instituted suits against it; that unless its assets were protected against separate

legal proceedings they might not be sufficient to pay all of its debts; and that inequitable preferences might thereby result. Mears therefore prayed the court to administer the Company's assets and business, to appoint a receiver for that purpose, and to restrain the institution and prosecution of judicial or statutory proceedings against the Company, "save and except the filing of mechanics' or other statutory liens." (R. 13–16.)

The Company admitted the allegations of the bill and joined in its prayers (R. 17), and on the day the bill was filed the District Court appointed a temporary receiver, authorized him to continue the Company's business, and restrained all creditors from interfering with the receiver's possession and from instituting and prosecuting any actions or proceedings against the Company. (R. 17–19.) On January 9, 1924, the temporary receiver was made the permanent receiver. (R. 19–20.)

On May 15, 1924, the Commissioner of Internal Revenue notified the Company of the assessment of an additional tax on its income for its fiscal year ending January 31, 1920 (R. 9), and on June 24, 1924, the Collector of Internal Revenue gave notice of the assessment and demanded immediate payment of the tax (R. 10). The Collector also filed a claim for the tax with the receiver. (R. 7–8.) The Collector of Customs of the Port of New York also filed claims with the receiver for customs duties (R. 12–13), apparently on importations made prior to the receiver's appointment.

At the time that the receivership proceedings were instituted the last two installments of the Company's income tax for its fiscal year ending January 31, 1923, were unpaid (R. 4), but the receiver paid them after his appointment (R. 5), *thus recognizing his obligation fully to discharge a tax liability which had accrued prior to his appointment.*

The Company's assets have been liquidated by the receiver (R. 6), and general creditors will not receive more than 40 per cent of their claims (R. 7).

The Special Master (R. 1), the District Court (R. 21), and the Circuit Court of Appeals (R. 24), all held that the Government was entitled to priority of payment of the tax and customs duties as against general creditors.

The receiver contends that this decision was erroneous because (1) the United States have only statutory rights of priority; (2) the only possible statutory sources of priority are R. S. 3186 and R. S. 3466; and, finally, (3) the Government was entitled to no priority under the former statute because its provisions were not complied with prior to the receivership, and to none under the latter because the taxpayer was not divested of its property in one of the ways specified thereby.

THE STATUTES TO BE CONSIDERED

1. The Revenue Acts

A. The Revenue Act of 1918 (40 Stat. L. 1057)

SEC. 230. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the

net income of every corporation a tax at the following rates: * * *

SEC. 239. * * * In cases where receivers * * * are operating the property or business of corporations, such receivers * * * shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers * * * shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

SEC. 250. * * * (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. * * *

If the amount already paid is less than that which should have been paid, the difference shall * * * be paid upon notice and demand by the collector.

(e) If any tax remains unpaid after the date when it is due and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due * * *.

SEC. 1305. That all administrative * * * provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act * * *.

B. The Revenue Act of 1921 (42 Stat. L. 227)

SEC. 250. * * * (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. * * *

If the amount already paid is less than that which should have been paid, the difference * * * (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due * * * shall be paid upon notice and demand by the collector.

(d) * * * If upon examination of a return made under * * * the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days * * * in which to file an appeal * * *. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector

as hereinafter provided * * *. *Provided,* That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount * * *.

SEC. 1300. That all administrative * * * provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act * * *.

2. The Revised Statutes

SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. * * *

SEC. 3184. Where it is not otherwise provided, the collector shall * * * within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, * * *

stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes, within ten days after the service or the sending by mail of such notice, it shall be the duty of the collector * * * to collect the said taxes with a penalty of five per centum additional upon the amount of taxes, and interest at the rate of one per centum a month.

SEC. 3186. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, * * * upon all property and rights to property belonging to such person: *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: *Provided, further,* That whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that state, * * * then such lien shall not be valid in that State against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties * * * within which the property subject to the lien is situated.

SEC. 3187. If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes * * * by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, * * * of the person delinquent as aforesaid. * * *

SEC. 3196. When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate.

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

70421—25——3

ARGUMENT

Summary

I. By virtue of R. S. 3466 the Government is entitled to payment of its taxes in advance of the claims of general creditors in an equity receivership proceeding instituted with the defendant's consent.

II. The income tax involved in this case was entitled to priority of payment (A) by virtue of the provisions of the Revenue Acts by which it was levied and under which it was assessed, (B) by virtue of the provisions of R. S. 3186, and (C) because Congress having established an extra-judicial system for the collection of the internal revenue which was designed to insure, and which, in the absence of judicial interference will normally result in its prior payment, it is the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors.

III. Independently of statute, the United States were entitled to priority of payment of both the customs duties and the income tax involved in this case, because (A) priority of payment inheres in the very concept of a tax and (B) the right to priority of payment of taxes is an attribute of the sovereignty of the Government.

I

By virtue of R. S. 3466 the Government is entitled to payment of its taxes in advance of the claims of general creditors in an equity receivership proceeding instituted with the defendant's consent

If R. S. 3466 is applicable to equity receiverships, instituted with the consent of the debtor, the petitioner concedes that the Government is entitled to priority of payment of its taxes. However, the petitioner argues at great length that R. S. 3466 has no application to such a receivership. The applicability of R. S. 3466 to equity receiverships is the question submitted for adjudication in *United States* v. *Butterworth-Judson Corporation et al.*, No. 503, which has been fully argued orally and by briefs. Therefore, although the Government in this case, as in that, relies upon R. S. 3466, it is unnecessary in this brief to repeat the Government's argument in that case or to discuss the subtleties and refinements employed by the petitioner in this case to show the inapplicability of R. S. 3466 to consent receiverships. The Government submits that question upon its argument in the *Butterworth-Judson* case.

However, only the question of the applicability of R. S. 3466 to consent receiverships is common to this case and the *Butterworth-Judson* case. ***This case involves a tax. That case involves a debt. The Government contends in this case that without regard to R. S. 3466 it is entitled to priority of payment of its taxes.*** That is the proposition we shall endeavor to demonstrate in this brief.

II

The income tax involved in this case was entitled to priority of payment (A) by virtue of the provisions of the Revenue Acts by which it was levied and under which it was assessed, (B) by virtue of the provisions of R. S. 3186, and (C) because Congress having established an extra-judicial system for the collection of the internal revenue which was designed to insure, and which in the absence of judicial interference will normally result in, its prior payment, it is the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors

A

The income tax was entitled to priority of payment by virtue of the provisions of the Revenue Acts of 1918 and 1921

The Revenue Act of 1918 levied the income tax in question and ordained in absolute and unqualified terms that it should be paid (*supra,* p. 4). It was assessed under the provisions of Section 250 (b) of the Revenue Act of 1921 (*supra,* p. 6). Neither Act makes any exception in favor of corporations in receivership or grants them any special privileges. On the contrary, both Acts clearly manifest an intention that such corporations should, *to the extent of their financial capacity,* pay all taxes due the Government upon income which accrued prior to receivership as well as upon that which accrued subsequently. Each Act provides in Section 250 that as soon as practicable after a return is filed the Commissioner of Internal Revenue shall examine it and shall recompute the tax, and that if it exceeds that shown in the return the ex-

cess shall be paid upon notice and demand by the collector of internal revenue. If the additional tax is not so paid, then a penalty and interest are added, " except in the case of estates of insane, deceased, or insolvent persons " (*supra,* pp. 5, 7).

Thus, each Act contemplates the assessment of additional taxes against insolvent persons and relieves their estates only of the penalty and interest for which solvent persons are liable if the additional tax is not paid within ten days after demand. Congress must be deemed to have realized that the estates of insolvent corporations are frequently administered in equity receiverships, yet no distinction is drawn by either Act between additional taxes assessed and demanded before and those assessed and demanded after receivership proceedings are instituted, or between additional taxes on past income and those on current income.

If further evidence is required that Congress intended the provisions of the Revenue Acts to apply equally to all corporations, whether solvent or insolvent, whether in receivership or under the management of the corporate officers, it is to be found in those sections of the Revenue Acts (*supra,* p. 5) which require a receiver who is operating the property or business of a corporation to make returns for such corporation, and provide that any tax due thereon is to be collected " in the same manner as if collected from the corporation."

An analogous situation was presented in *Swarts* v. *Hammer,* 194 U. S. 441, where it was contended

that the Government's priority for taxes was limited by the Bankruptcy Act of 1898 to taxes "legally owing" at the time of adjudication and did not extend to taxes subsequently accruing. This Court said (p. 444):

> By Section seven of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

The Bankruptcy Act was therefore held to apply to current as well as to back taxes, although it mentioned specifically only the latter. Similar reasoning leads to the conclusion that Congress intended that corporations in receiverships should pay back, as well as current, taxes in full, whenever assessed and demanded, to the extent of their capacity to pay.

Furthermore, the Revenue Acts incorporate within themselves all applicable administrative pro-

visions of law for the collection of taxes, including the provisions of R. S. 3186 (*supra*, p. 8).

B

The income tax was entitled to priority of payment under R. S. 3186

That Section provides in substance that if any person fails to pay a tax after demand, the amount thereof shall be a lien upon all of his property from the time when the assessment list was received by the collector, but that the lien " shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed " as required by law.

Payment of the income tax involved in this case was demanded (R. 10). It was not paid. It is perfectly clear, therefore, that if receivership proceedings had not intervened the Government would have acquired a lien upon all the property of the Gidding Company which would have been valid against its general creditors. It seems equally clear that the appointment of a receiver can not render the Government impotent to assess or to demand the payment of taxes. But if the Government can demand the payment of a tax, it can also acquire a lien therefor in spite of a receivership, for the result of a demand followed by failure to pay is prescribed by statute. It can not be proscribed by the courts.

Whenever the statutory conditions precedent of demand and failure to pay have been met, the statu-

tory lien arises inevitably and automatically. If that is not so, the statute furnishes the Government with a sword which must remain sheathed when most urgently needed to protect the public revenue.

Income taxes are assessed in the first instance upon the basis of the taxpayer's return. If he returns his entire net income, as it is his duty to do, an additional assessment is impossible. However, returns must be audited to determine their accuracy and, because of the vast number of returns, a considerable interval must necessarily elapse between the filing of a return and its audit. Not until the audit is made can an additional tax be assessed or its payment demanded. A large part of the public revenue results from additional assessments. The total internal revenue receipts for the fiscal years 1917 to 1925, inclusive, amounted to $29,560,952,689.56. Of that amount $2,811,258,170, or almost 10% was collected as the result of additional assessments. If the Government can not acquire a lien for the additional tax when assessed, it must assume every risk of adverse changes in the taxpayer's financial condition after the return is filed. The statute places no such risks upon the Government. It does not thus imperil the public revenue. It is perfectly specific in its enumeration of the hazards to which taxes are subjected. The Government runs the risk that before the tax is demanded the rights of purchasers, mortgagees, or judgment creditors will have intervened. It runs and can be made to run no other risk. The statute

does not force it into competition with the taxpayer's general creditors.

If, as the petitioner contends, the institution of receivership proceedings against a corporation between the filing and the audit of its return can prevent the Government from acquiring a lien for additional taxes, it is a simple matter for the corporation and its general creditors to reduce the Government to the status of a general creditor and a tax to the status of an ordinary debt merely by the collusive institution of such a proceeding. Receivership proceedings such as that involved in the case at bar are always collusive, at least in the sense that the defendant's consent is a prerequisite to the court's jurisdiction. *Re Metropolitan Railway Receivership,* 208 U. S. 90. If the petitioner correctly states the law, creditors, with their debtor's cooperation, by selecting an equity instead of a bankruptcy court to administer the assets of their insolvent corporate debtor, can easily defeat the Government's priority for its taxes.

The Government contends, however, that there is nothing in the nature or purpose of receivership proceedings which should lead the courts to deny to a demand followed by failure to pay, the statutory lien which, as against general creditors, entitles it to priority of payment in the distribution of the receivership assets. The Government claims no right to enforce its lien elsewhere than in the receivership proceeding or to interfere with the

court's possession of the taxpayer's property, either by distraint or otherwise. *Cf. In re Tyler,* 149 U. S. 164. It need hardly be said that the custody of the court can not possibly be affected by the process by which the lien arises. The lien affects only the order of distribution in the receivership proceeding itself.

There is nothing fearful or even novel in the notion that statutory liens may arise after the appointment of a receiver. The complainant in the present case recognized that possibility by excepting "the filing of mechanics' or other statutory liens" from the injunction against the institution and prosecution of judicial and statutory proceedings for which he prayed. (R. 16.)

Liens for current taxes undoubtedly can and do attach after the appointment of a receiver. *Union Trust Co.* v. *Ill. Midland R. Co.,* 117 U. S. 434, 461; *First Nat. Bank* v. *Ewing* (C. C. A. 5 C.), 103 Fed. 168, 188; *Bright* v. *Arkansas* (C. C. A. 8 C.), 249 Fed. 953, 955. But the year in which the income was earned on which the tax is levied is immaterial. The lien is the same. It has its source in the same statute. It arises in precisely the same way. Therefore, no valid reason is to be found in the fact that a tax is not a current tax for denying to it the lien which the statute expressly says shall result from the demand for its payment and the failure to pay it.

Mechanics' liens are another example of statutory liens which can and do arise after the ap-

pointment of a receiver. A mechanic or materialman may comply with the statutory conditions precedent to the creation or perfection of his lien after the receiver's appointment,[1] or, to avoid expense and delay, the courts recognize the lien as if the statutory conditions had been fulfilled.[2]

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[1] *Westinghouse Airbrake Co.* v. *Kansas City Southern Ry. Co.* (C. C. A. 8 C.), 137 Fed. 26; *Fenton* v. *Fenton Building Co.*, 90 Conn. 7; *Doty* v. *Auditorium Pier Co.*, 65 N. J. Eq. 768; *Commonwealth Roofing Co.* v. *North American Trust Co.* (C. C. A. 1 C.), 135 Fed. 984; *United States and Mexican Trust Co.* v. *Western Supply & Mfg. Co.*, 109 S. W. (Tex.) 377; *Filer & Stowell Co.* v. *Empire Lumber Co.*, 91 Ga. 657; *Van Frank* v. *Brooks*, 93 Mo. App. 412; *Withrow Lumber Co.* v. *Glasgow Inv. Co.* (C. C. A. 4 C.), 101 Fed. 863. In *Commonwealth Roofing Co.* v. *North American Trust Co.*, the court said (p. 989): "In other words, by appointing the receiver of the property upon which the lien attached, the Circuit Court assumed the control thereof and of the lienor, and stood in its path; and, having assumed such control, it also, on settled principles, assumed the obligation to do equity, and to protect the lienor so far as it had any just rights in the premises." In *Filer & Stowell Co.* v. *Empire Lumber Co.*, the court said (p. 658): "Failure to claim and record it could not be excused by the fact that the premises and mill on which the lien would have attached were put into the hands of a receiver by judicial proceedings before the time for recording had expired. The custody of the property by a receiver would be no impediment to claiming and recording the lien, and is wholly irrelevant as a reason for not doing so." In *Van Frank* v. *Brooks*, the court said (p. 426): "Nor was the intervenor debarred from proceeding to perfect and enforce a lien in the statutory mode by the order of the court placing the railroad property in a receiver's custody. * * * Courts of equity do not disregard plain statutes giving lienors a right to be paid before incumbrancers when they take charge of incumbered property at the latter's instance. They follow the law and uphold all its provisions as to priority."

[2] *Blair* v. *St. Louis, H. & K. R. Co.* (C. C. Mo.), 19 Fed. 861; *Central Trust Co.* v. *Texas & St. L. Ry. Co.* (C. C. Mo.), 23 Fed. 673; *Davis* v. *Foster*, 69 Pac. (Wash.) 1102. In *Central Trust Company* v. *Texas & St. L. Ry. Co.*, the court said (p. 873): "Where parties are entitled to a lien, and can secure it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien."

Further, the argument that a statutory lien for taxes can and does attach after the appointment of a receiver is fortified by the fact that even before assessment and demand the Government's lien is inchoate.[3] The assessment of the tax merely determines its amount. The demand for its payment only fixes the time when payment must be made. Neither the assessment nor the demand is the source of the tax liability. The obligation to pay taxes, both those originally and those subsequently assessed, originates in the Revenue Acts and comes into being with the annual income upon which the taxes are levied. *Heyward* v. *United States* (C. C. A. 5 C.), 2 Fed. (2d) 467.[4] From the moment the income is earned the Government has a right to a lien for the tax thereon, a right which can not be defeated by the institution of

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[3] An inchoate lien is defined in *Henderson* v. *Mayer*, 225 U. S. 631, 639, as a right to a statutory lien; in *Kane & Co.* v. *Kinney*, 174 N. Y. 69, 73, as "a preferential statutory right in the nature of an unperfected equitable lien"; in *Hildreth Granite Co.* v. *City of Watervliet* (N. Y.) 161 App. Div. 420, 423, as an equitable lien given by statute.

[4] In this case it appeared that a partnership, which had been in existence since 1917, was incorporated in 1919. In 1922 the corporation was adjudicated bankrupt. In February, 1923, the Commissioner of Internal Revenue assessed an additional excess profits tax for the year 1917 and filed a claim therefor in the bankruptcy proceedings. The court held that the Government was entitled to priority of payment and said: "The liability of the partnership was for a tax. *That tax accrued in 1917, and then became a lien against the property of the partnership.* The corporation took this property subject to the tax lien, because it had notice through the former partners * * * who are chargeable with notice, although the assessment was not recorded until after the partnership assets were acquired. The bankrupt does not occupy the position of a purchaser without notice, and therefore is not entitled to rely on R. S. § 3186 (Comp. St. § 5908). Actual notice to it took the place of record notice." (Italics ours.)

receivership proceedings before the tax is actually assessed or demanded.

In *Henderson* v. *Mayer,* 225 U. S. 631, the question was whether the levy of a distress warrant within three days of bankruptcy was valid under Section 67*f* of the Bankruptcy Act. The provisions of that section are similar in purpose to the injunction commonly issued in a conservation receivership proceeding designed to maintain the status existing at the time the receivership proceeding is instituted. The levy had been made under a Georgia statute which gave a landlord a general lien on his tenant's property and provided that it "*shall date from the time of the levy of a distress warrant to enforce the same.*" Despite that language this court held that the lien was inchoate from the beginning of the tenancy and that the levy was valid, saying (p. 638):

> The statutory restrictions as to date, rank, and priority may be important in a controversy with other lien holders, but was wholly immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. *As against them the landlord had from the beginning of the tenancy the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the*

nature of the claim and the relation between himself as landlord and Burns as tenant. (Italics ours.)

A similar question was involved in *Crane Company* v. *Pneumatic Signal Co.* (N. Y.) 94 App. Div. 53, under a statute giving a person performing labor for, or furnishing materials to, a contractor for the construction of a public improvement, a lien upon the public moneys applicable to the construction of such improvement, "upon filing notice of lien." A subcontractor filed his notice of lien *after* the institution of bankruptcy proceedings against the prime contractor. The court held the lien inchoate and the filing of the notice of lien valid under the Bankruptcy Act and said (p. 56):

> We regard the main question first above outlined to be authoritatively decided by the Court of Appeals in the case of *Kane Company* v. *Kinney,* 174 N. Y. 69 * * *. After a full and interesting discussion it was held that: "The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest which he acquires under the Mechanic's Lien Law by furnishing material or performing labor in the improvement of real property." It was further said: "A certain time is allowed in which the lien may be asserted or lost. *During that time there is a preferential statutory right in the nature of an unperfected equitable lien* in favor of the laborer, mechanic, materialman, or subcontractor. And

> when a notice of lien is filed that right is perfected." * * * And finally it was held that the inchoate right acquired by plaintiff in that case when it furnished its material or labor, when perfected by filing its notice of lien subsequent to the general assignment of the contractor, was superior to the general assignment or any rights acquired by the assignee or the creditors thereunder. (Italics ours.)

Statutes similar to those in the foregoing cases and to R. S. 3186, providing for liens upon the performance of specified conditions, have uniformly been construed as giving inchoate liens, the perfection of which is possible after the property upon which the lien is claimed passes into *custodia legis*. *Gates & Co.* v. *Stevens Construction Co.*, 220 N. Y. 38; *Hildreth Granite Company* v. *City of Watervliet* (N. Y.), 161 App. Div. 420; *Gates & Co.* v. *National Fair & Exposition Ass'n.*, 172 App. Div. 581; aff'd. 225 N. Y. 142; *In re Grissler* (C. C. A. 2 C.), 136 Fed. 754; *In re Coulter*, Fed. Cas. No. 3276; *In re West Norfolk Lumber Co.* (D. C. Va.), 112 Fed. 759; *Mott* v. *Wissler Min. Co.* (C. C. A. 4 C.), 135 Fed. 697. Surely no more than bankruptcy can an equity receivership operate to defeat such liens. The courts so hold, as we have shown.

Therefore, paraphrasing the language of this Court in *Henderson* v. *Mayer, supra,* and applying it to the facts in the case at bar, it follows that the fact that the demand for payment of the tax was

not made until after the receivership proceedings were instituted and that notice of the lien was not filed as required by R. S. 3186, is wholly immaterial in this controversy between the Government and general creditors as against whom, from the end of the taxable year in which the income was earned, the Government had a right to a statutory lien which ripened and completely attached upon the failure of the Gidding Company to pay the tax upon demand. *Berwind-White Coal Mining Co.* v. *Metropolitan S. S. Co.* (C. C. Me.), 166 Fed. 782, aff'd. (C. C. A. 1 C.), 173 Fed. 471; *Fagan* v. *Boyle Ice Machine Co.*, 65 Tex. 324. See *Commonwealth Roofing Co.* v. *North American Trust Co., supra.*

The petitioner's argument that the Government acquired and could acquire no lien under R. S. 3186 because payment of the tax was not demanded until after the receiver's appointment, is an excellent illustration of that sterile logic which alone may be employed in an attempt to defeat the Government's claim to priority over general creditors, which proceeds inevitably from false premises to an unsound conclusion, and which never once penetrates the heart of the problem. The petitioner seeks to bring general creditors within the proviso of R. S. 3186. His argument is that by bringing his bill the complainant, by some legal legerdemain, acquired the status of a judgment creditor, a status which by some further magic he was able to transmit to the receiver and through the receiver to all general creditors, and that therefore, even if the Govern-

ment acquired a lien, it was invalid as against general creditors who had been thus transformed. The argument is, further, that no lien could attach after the appointment of the receiver, because his appointment operated as an "equitable levy in favor of all creditors." These arguments we shall answer in turn.

(1) *Neither the complainant, nor any other general creditor, nor the receiver, is a judgment creditor within the meaning of R. S. 3186.*

The Government does not contend, as the petitioner suggests, that if the complainant or any other creditor of the Gidding Company had in fact been a judgment creditor with a lien on the Company's property when the bill was filed, the Government's lien would have been valid as against such judgment creditor. The Government concedes that in any proceeding in which its lien clashes with the lien of a judgment creditor, the latter must prevail unless notice of the Government's lien has been filed as required by statute. However, this controversy is a contest, not between the Government and judgment creditors, but between the Government and general creditors. No party to this controversy is in fact a judgment creditor, much less a judgment creditor with a lien. The effort is to give the complainant, and through him the receiver, and through the receiver all general creditors, the artificial status of judgment creditors, and thus to invalidate the Government's lien.

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The effort is predicated chiefly upon *American & B. Securities Co.* v. *American & B. Mfg. Corp.* (D. C. N. Y.), 275 Fed. 121.[5] In that case, as in this, a receiver was appointed at the suit of a simple contract creditor. The defendant had given a chattel mortgage which was void against all creditors, whether judgment or general, under the New York law, because unfiled. *Karst* v. *Gane,* 136 N. Y. 316; *Stephens* v. *Perrine,* 143 N. Y. 476. In the language of the court (p. 122), the only question was whether the receiver represented creditors within the meaning of the New York Lien Law. The court answered the question in the affirmative. Obviously it was merely a procedural question which had nothing to do with substantive rights. The court did not hold, as the petitioner suggests, that general creditors in a proceeding such as this are endowed with the same rights they would have were they in fact judgment creditors. The court did not decide that in a proceeding such as this the receiver can defeat claims which are good as against general creditors.

That we have correctly interpreted the decision in the *American & British Securities Co.* case is shown by *Bell* v. *New York Steam Power Co.* (D. C. N. Y.), 183 Fed. 274, and *Cornelius* v. *C. C. Pictures, Inc.* (D. C. N. Y.), 296 Fed. 487, aff'd. (C. C. A. 2 C.), 296 Fed. 490. In the *Bell case* the same question was before the same judge. In the course of his

[5] It is to be observed that the opinion was rendered by Learned Hand, J., who also concurred in the opinion rendered by the court below in the case at bar.

opinion he distinguished between receivers in statutory supplementary proceedings in New York and receivers in proceedings like the present one, by saying (p. 276) that " the former stand explicitly in the right of judgment creditors, *and are, therefore, not precisely like sequestration receivers in equity.*"

When the question whether a sequestration receiver has the status of a judgment creditor as a matter of substantive law has arisen, the answer has been an unequivocal negative. The question has been raised in striking form in New Jersey. Under the statutes of that State unfiled chattel mortgages are void as against *general creditors,* but unfiled conditional sales agreements are void only as against *judgment creditors.* Because of that difference, it is uniformly held that a sequestration receiver may defeat unfiled chattel mortgages, but can not question unfiled conditional sales agreements. *Smith* v. *Hotel Ritz Co.,* 74 N. J. Eq. 296; *Falaenau* v. *Reliance Steel Co.,* 74 N. J. Eq. 325; *Cumberland Trust Co.* v. *Ayers & Sons Co.,* 83 N. J. Eq. 479; *Rapoport* v. *Rapoport Express Co.,* 90 N. J. Eq. 519; *Wood* v. *Cox,* 92 N. J. Eq. 307

But whatever the law in other forums the matter has long since been put at rest in this Court by the decision in *Day* v. *Washburn,* 24 How. 352, in which simple contract creditors, who had filed a bill to set aside an assignment as fraudulent, contended that merely because they had filed the bill they should be given priority over subsequently inter-

vening creditors of the same class. The Court rejected that contention and said (p. 355):

> The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a pro rata distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce. * * *
>
> The two firms, therefore, who filed the bill, the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors. * * * The objection that the demands of the appellants had not been reduced to a judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived, however, both as respected the appellants and the other co-complainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the

debtor, and to make the proper application of them; and, as we have seen, neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below.

That decision reveals, if, indeed, anything is needed to reveal, the utter lack of merit in the petitioner's contention based upon *Re Metropolitan Railway Receivership, supra,* that the complainant and the receiver in a receivership proceeding instituted by a general creditor acquire the artificial status of judgment creditors merely because the defendant waives the jurisdictional objection that the complainant is not a judgment creditor.

(2) *The doctrine of equitable execution does not prevent the Government's statutory lien for taxes from attaching after the appointment of a receiver.*

"Confusion of ideas," said Cotton, L. J., in *In re Shephard,* 43 Ch. Div. 131, 135, " has arisen from the use of the term ' equitable execution.' The expression tends to error." Its tendency to error was never better illustrated than in the case at bar in which a general creditor attempts to make use of it to defeat the Government's right to priority.

The doctrine of equitable execution originated in creditors' bills, essentially selfish proceedings brought to obtain satisfaction of the claim of the moving creditor. As the reward of his diligence he

obtained a preference over other creditors of the same class, by analogy to the law. A legal levy being impossible, the filing of the bill was regarded as an equitable execution, sufficient to justify the vigilant creditor's preferment over other creditors. *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S. 710; *Sage* v. *Memphis, etc., Railroad Co.*, 125 U. S. 561; *Metcalf* v. *Barker*, 187 U. S. 156; *Atlantic Trust Co.* v. *Dana* (C. C. A. 8 C.), 128 Fed. 209. Thus, equitable execution was the analogue of legal execution. However, it was a fiction; it was no execution, but a substitute for execution. *In re Shephard, supra.*

A simple contract creditor may maintain a creditor's bill only if the defendant waives the jurisdictional requirement of judgment and execution. *Re Metropolitan Railway Receivership, supra; Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491. However, the effect of the defendant's consent is not to transform the moving creditor into a judgment creditor, but quite the reverse. Whatever the purpose of the bill, it proceeds for the benefit of all creditors. The complainant gains no advantage over other creditors by his diligence. In such a proceeding the fiction of equitable execution acquires a new meaning and purpose. It is descriptive of the process by which the court obtains custody of the *res*. It protects the court's custody against invasion. See *Day* v. *Washburn, supra; Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.* (D. C. N. Y.), 281 Fed. 265; *Pennsylvania Steel Co.*

v. *New York City Railway Co.* (C. C. A. 2 C.), 198 Fed. 721, 737. *But the filing of the bill no longer creates a lien. Equitable Trust Co.* v. *Connecticut Brass & Mfg. Co.* (C. C. A. 2 C.), 290 Fed. 712, 726.

The receivership thus becomes a shield to guard the assets. It is no longer a sword to cut down the rights of any interested party in behalf of any other. The receiver acts for all parties, indifferent as between them. He holds for the benefit of whomsoever in the end it shall be found to concern. *Fosdick* v. *Schall*, 99 U. S. 235, 251; *Davis* v. *Gray*, 16 Wall. 203, 217; *H. K. Porter Co.* v. *Boyd* (C. C. A. 3 C.), 170 Fed. 4; *Pennsylvania Steel Co.* v. *New York City Railway Co., supra.* In *Pusey & Jones Company* v. *Hanssen, supra,* it is said (p. 497):

> A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.

There is nothing, therefore, in the doctrine of equitable execution or in the character or purpose of a receivership proceeding initiated by general creditors, to prevent the creation or perfection of statutory liens, including tax liens, after the bill is filed, *cf. Pennsylvania Steel Company* v. *New York City Railway Co., supra* (p. 740); *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, and, as

we have seen, the courts so hold. Indeed, they go much further, and in the distribution of receivership assets, in spite of forms and formulae, in many instances recognize mere equities as superior not only to the claims of general creditors, but to liens existing when the bill was filed.[6]

It is, therefore, clear that neither by virtue of any preexisting right nor by virtue of any right accruing to them upon the filing of the bill, do the simple contract creditors of the Gidding Company occupy, either in their own persons or vicariously through the receiver, any better position than that of general creditors as against whom the Government's lien is not invalidated by its failure to file notice thereof. The Government did not institute this receivership proceeding and its rights should not suffer because of its institution by general creditors for their own purposes.

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[6] Thus, for reasons of public policy or special considerations affecting the claims or the claimants, it has been considered equitable to give priority to so-called supply creditors, *Fosdick* v. *Schall*, 99 U. S. 235; *Miltenberger* v. *Logansport R. R. Co.*, 106 U. S. 286; Southern *Railway* v. *Carnegie Steel Co.*, 176 U. S. 257; to sureties who have aided in maintaining a company as a going concern, *Union Trust Co.* v. *Morrison*, 125 U. S. 591; *Jones* v. *Central Trust Co.* (C. C. A. 6 C.), 73 Fed. 568; *City Trust Co.* v. *Sedalia Light & Traction Co.* (D. C. Mo.), 195 Fed. 845; to shippers who have paid excessive freight rates, *Love* v. *North American Co.* (C. C. A. 8 C.), 229 Fed. 103, *United States & Mex. T. Co.* v. *Kansas City, M. & O. Ry. Co.* (D. C. Kan.), 240 Fed, 505; to material men and laborers for whose benefit payments due a contractor were withheld, *Belknap Hardware & Mfg. Co.* v. *Ohio River C. Co.* (C. C. A. 6 C.), 271 Fed. 144; to consumers who have paid deposits to a gas company, *Pintsch Compressing Co.* v. *Buffalo Gas Co.* (C. C. A. 2 C.), 280 Fed. 830; and to an administrator with whom an agreement to compromise a claim for wrongful death had been made before receivership, *Harmon* v. *Blackwell* (C. C. A. 6 C.), 232 Fed. 440.

C

Congress has established an extra-judicial system for the collection of the internal revenue, which was designed to insure, and which in the absence of judicial interference will normally result in, its prior payment. It is therefore the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors

As we have pointed out, the Revenue Acts incorporate within themselves not only R. S. 3186, but *all* applicable administrative provisions of law for the collection of the internal revenue. These provisions, found in the Revised Statutes (*supra*, p. 7 et seq.), constitute a complete extrajudicial system for the collection of taxes. The collectors of internal revenue are required to collect all the taxes imposed by law. (R. S. 3183.) Within ten days after receiving any list of taxes from the Commissioner of Internal Revenue they must give notice and demand payment of the taxes stated therein. (R. S. 3184.) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount of the tax is made a lien upon all of the taxpayer's property, as we have pointed out. (R. S. 3186.) If the tax is not paid within ten days after demand, the collector may collect it by distraint and sale of the taxpayer's personal property (R. S. 3187), or, if that is insufficient, by seizure and sale of his real estate (R. S. 3196).

To guard this administrative system against judicial invasion or interference, Congress has forbidden the maintenance of suits to restrain the assessment or collection of any tax (R. S. 3224).

By establishing in the Revenue Acts and the Revised Statutes an extra-judicial system for the assessment and collection of taxes, which is obviously designed and fully effectual to insure their priority of payment—in other words, by giving taxes a remedial preference—Congress has clearly expressed the legislative will that taxes shall be paid in advance of a taxpayer's general indebtedness. In any race of diligence between the Government and a general creditor, the Government must inevitably prevail, as Congress manifestly intended that it should prevail. Merely by demanding the payment of its taxes, the Government may perfect a lien therefor upon all the property of the taxpayer superior to the claims of general creditors, and after ten days it may proceed to foreclose its lien by seizure and sale. This Court has often recognized the summary character of the administrative system for the collection of taxes and the imperative necessity for such a system.[1] No such sum-

[1] In *Kelly* v. *Pittsburgh*, 104 U. S. 78, the Court said (p. 80): "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. *The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure*, which in regard to that matter is, and always has been, due process of law." (Italics ours.)

In *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, the court said (p. 282): "It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. *Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding*, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." (Italics ours.)

mary method of collection is given or open to general creditors. As the court said in *Jack v. Weiennett,* 115 Ill. 105, 109:

> A creditor has no right to distrain and sell property. He must first get a judgment and an execution. But the State, because of the importance and urgency of its claim, is not required to wait for a judgment. If a tax due is not paid on demand, the collector may proceed to seize property and sell it for its payment. Before property can be protected, and the right of creditors enforced, the State must have the means of subsistence. It can not perform its functions without them, and they can only be obtained through some system of taxation. *The claim for the payment of taxes upon the citizen is, therefore, of necessity paramount to all other claims against his property.* (Italics ours.)

Perhaps no principle is more firmly embedded in our constitutional and legal systems than that of the inviolability of the administrative machinery for the assessment and collection of taxes from judicial obstruction. *Cheatham* v. *United States,* 92 U. S. 85; *Graham* v. *du Pont,* 262 U. S. 234; *Robinson* v. *City of Wilmington* (C. C. A. 4 C.), 65 Fed. 856. Furthermore, not only do the Revenue Acts and the administrative provisions of law for the collection of the taxes levied thereby make no exception in favor of insolvents or of businesses or property *in custodia legis,* but the courts themselves have uniformly

recognized that no exemption from taxation can be gained by the receivership process. *In re Tyler,* 149 U. S. 164; *Ex parte Chamberlain* (C. C. S. C.), 55 Fed. 704; *Dysart* v. *Brown,* 100 Ga. 1. As the Supreme Court of Georgia said in the *Dysart case* (pp. 2, 4):

> The right to levy and collect taxes for the support of its institutions of government is one of the supreme attributes of a sovereign power, and this charge upon the property of the citizen is, by the law of this State, made superior to any other encumbrance which may be imposed upon it, either by contract or by law. It is universal in its application, and the mere fact that the property of a corporation may be in the hands of a receiver appointed by a court of equity, affords no exception to the rule, and does not exempt the property of such a corporation from taxation. Property so circumstanced is as much bound to sustain its proportionate share of the burdens of government as any other, and being liable for taxation, there must of necessity be some means for the enforcement of this charge in favor of the State. * * *
>
> It being fundamental that courts, like persons, should pay the charges imposed for taxes upon property in their custody, it is their duty to make such orders as will compel their representatives to discharge this obligation. *It is not within the general power of a court of equity, by the appointment of a receiver, to establish a judicial pro-*

> *tectorate over the assets of an insolvent person or corporation, and by doing so, indefinitely withdraw the same from appropriation to the payment of taxes lawfully assessed against it.* (Italics ours.)

In *Ex parte Chamberlain*, the *Tyler* case in the lower court, the court said (p. 706):

> There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Persons cannot, by coming into this court, and for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen.

Upon what theory then is a court of equity, which has gained possession of a taxpayer's property, to ignore the legislative mandate contained in the Revenue Acts that the taxes levied thereby *shall* be paid and to thwart the legislative intention expressed both in those Acts and in the Revised Statutes that they shall *first* be paid? Eminent judges, unable to find such a theory, have gone so far as to hold that the fact that property is *in custodia legis* does not and should not prevent its seizure and sale for the purpose of satisfying taxes.

In *Stevens* v. *New York & O. M. R. Co.* (C. C. N. Y.), 13 Blatchf. 104; Fed. Cas. No. 13405, a receiver appointed in a foreclosure action sought to enjoin a state tax collector from selling property in

the receiver's custody, under tax warrants, alleging that the taxes had been illegally assessed. Blatchford, J., afterwards Mr. Justice Blatchford, denied the injunction and said:

> There is no prerogative of sovereignty which is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of the taxes. The very existence of the state as a government depends upon the exercise of such power. * * * There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a court of justice, for the purposes of a suit pending in such court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated.

In *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.* (C. C. Mo.), 26 Fed. 11, a receiver sought to attach a collector of taxes who had issued his warrant and levied on property in the receiver's possession. Brewer, J., afterwards Mr. Justice Brewer, said:

> It is not represented in the petition that the taxes are not just and legal, or that they are not due. The statutes of Missouri make it the duty of the collector, if the taxes are not paid, to issue his warrant and seize property, and sell the same as upon execution. * * * Be that as it may, I think that in levying and collecting taxes the state is ex-

> ercising its sovereign power, and that there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers, unless it is first charged that the taxes are in some way illegal or excessive. The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the state for their collection. It may be hard for the road to pay these taxes, but it can be no harder for a corporation in the hands of receivers to pay taxes than it is for an individual, and the remedy of the state is in each case the same.

However, it may be conceded that in the *Tyler* case, *supra,* this Court laid down a different rule. In that case Mr. Chief Justice Fuller, speaking for the Court, said (p. 182):

> The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis,* and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a

wanton disregard of the orders of the court in respect of it. *The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other,* and the possession of property by the judicial department can not be arbitrarily encroached upon save in violation of this fundamental principle.

The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face. (Italics ours.)

If, as this Court held in the *Tyler* case, it is the duty of tax collectors to refrain from the seizure and sale of property in the custody of the courts, in the interest of the orderly administration of justice and because of the relationship and coordinate rank of the judicial and executive branches of the Government under our constitutional system,

it would seem to be equally the duty of the courts to direct the prior payment of the Government's taxes and thus to give effect to the legislative intent embodied in the administrative system for their collection. A receivership may justify a variation of the means; it can not justify a change in the result. On no other theory may the courts interrupt executive processes authorized by statute for the collection of taxes. The judicial, no less than the executive, must respect and observe the expressed will of the legislative department in all matters within legislative control.

This Court has recognized the validity of that proposition. In *In re Tyler, supra,* the Court said (p. 186):

> The inevitable conclusion that this must be so, if constitutional principles are to be respected in governmental administration, does not involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but, on the contrary, *it makes it the imperative duty of the court to recognize as paramount, and enforce with promptness, and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue.* * * * The tax collector is a ministerial officer, * * * and no reason is perceived why he should not bring his claim to the attention of the court, while, on the other hand, it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid, they must be paid; if invalid,

> the court will so declare, subject to the review of the appellate tribunals. (Italics ours.)

Other courts, federal and state, have frequently expressed and applied the same principle. In *Burleigh* v. *Chehalis County* (C. C. Wash.), 75 Fed. 873, a receiver sought to restrain county officers from selling receivership property for delinquent taxes. The court overruled a demurrer to the bill and said (p. 873):

> All the property of the Northern Pacific Railroad Company situated in this state, including real estate, is, and was at the date of the judgment referred to, in the legal custody of this court, through its receiver, and it is not subject to seizure or sale under process emanating from any other authority. This court will require its receiver to pay all lawful taxes, and there is no necessity for burdening the property with the expense of a sale under the state revenue law; and such proceedings, which interfere with the administration of the estate in receivership, can not be permitted.

The same matter was subsequently presented to the court on the merits in *Northern Pacific R. Co.* v. *Galvin* (C. C. Wash.), 85 Fed. 811, and the court said:

> In ruling upon questions raised in settling the issues in the pleadings, I expressed my opinion, based upon the decision of the supreme court of the United States in the case of *In re Tyler*, 149 U. S. 164–169, 13

> Sup. Ct. 785, to the effect that a collector of taxes can not legally execute process for the collection of delinquent taxes by sale of property in the custody of a receiver appointed by a United States court. At the same time I gave a plain intimation that, upon an application to this court, the receivers would be ordered to pay all taxes legally chargeable against the property of the railroad company. * * * Upon the authority of these decisions, I hold that the lands were subject to taxation for state, county, and district purposes at the time of the annual assessment for the taxes of 1891; and, if taxes upon said lands had been legally assessed and levied, the court would feel obliged to order payment thereof as a condition of the granting of any relief to the plaintiff; and, upon the payment of the amount of taxes legally levied, the plaintiff would be entitled to an injunction, for the reason that at the time of the commencement of this suit the lands were in the custody of this court, through its receivers, and the treasurer of Lewis county could not lawfully proceed with the sale thereof.

In *Ledoux* v. *La Bee* (C. C. S. D.), 83 Fed. 761, a receiver sought to enjoin the sale of certain personal property by the county treasurer to satisfy taxes that had accrued *before*, as well as after, the appointment of the receiver. On the authority of the *Tyler case*, the court held that the property, being *in custodia legis*, was not subject to seizure and sale by the tax officials. The court therefore

ordered that the county treasurer should restore possession of the seized property to the receiver and that the receiver should thereupon pay the taxes.

In *Gutterson* v. *Lebanon Iron & Steel Company* (C. C. Pa.) 151 Fed. 72, receivers were appointed, as in the case at bar, upon a bill filed by general creditors for the purpose of conserving the defendant's assets. The question before the court was the propriety of certain payments by the receivers for taxes, *past* and current, and for other purposes. The court approved the payment of the taxes, saying (p. 75):

> The same is true of taxes past and current, which had to be paid or the personal property would be liable to be levied upon, and which the receivers therefore properly took care of, in order to protect it, without any order.

The application of the doctrine that a court of equity must direct the prior payment of taxes in a receivership proceeding if it stops the executive machinery for their collection, extends as well to past as to current taxes, as well to taxes which have not become, as to taxes which are, liens on the property in the court's possession. *Ledoux* v. *La Bee, supra; Coy* v. *Title Guarantee & Trust Co.* (C. C. A. 9 C.), 220 Fed. 90; *Bear River Paper & Bag Co.* v. *City of Petosky* (C. C. A. 6 C.), 241 Fed. 53. The duty of the court does not arise from the existence of a technical lien. It grows out of the unequivocal expression of the legislative purpose to give taxes

priority of payment; it is essential to the orderly administration of government. It is born of the relationship between the executive and the judiciary; and it inheres in our governmental structure. In *Greeley* v. *The Provident Savings Bank,* 98 Mo. 458, quoted with approval in the *Tyler* case, a tax collector intervened in a receivership proceeding for an order directing the receiver to pay certain taxes. The court directed their payment and said (p. 460):

> The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. *It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver,* but it had a right paramount to other creditors to be paid out of those assets, * * * a right which it could have enforced through its revenue officers by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers

> of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance. (Italics ours.)

In *George* v. *St. Louis Cable & W. Ry. Co.* (C. C. Mo.), 44 Fed. 117, a receiver was appointed on October 17, 1889. An interlocutory decree directed the sale of the property in receivership, " subject to all liens for taxes." The court held that taxes on personal property for the year 1889 should be first paid out of the resulting fund, and said (p. 118):

> It seems to be the law in Missouri that for taxes assessed on personal property the state has no lien on the property until an actual levy has been made under the tax bill. * * * Such being the local law with respect to taxation, it follows that the provision of the interlocutory decree directing a sale to be made " subject to all liens for taxes " is no obstacle in the way of allowing the state a priority as to the tax bill against personalty, for as to such property there was no lien at the time of the sale; and, because

> the purchaser took the personal property unincumbered by a tax-lien, the state in all probability will lose the bill, unless the court directs its payment out of the proceeds of the sale. Inasmuch as the receiver appointed in this case had possession of the property on account of which the tax was imposed during the period within which the collector might have made, and probably would have made, a levy but for the existence of the receivership, it is plainly the duty of the court to see that the tax bill against personalty is paid in preference to all other demands. The appointment of a receiver and sale of property by a decree of this court, in a case of this character, will not be allowed to interfere with or to defeat the collection of the public revenue. The bill against personal property will therefore be paid.

While the foregoing cases involve State taxes they were not decided on the theory that the taxes had become liens or were given priority under State statutes, or that the States in question had adopted the common law prerogative of priority.[8] The

[8] And, as a matter of fact, only in New York, Georgia, Maryland, and Missouri do the courts hold that the common law prerogative exists. *Matter of Carnegie Trust Co.*, 206 N. Y. 390; *Robinson* v. *Bank of Darien*, 18 Ga. 65; *State* v. *Rowse*, 49 Mo. 586; *State* v. *Bank of Maryland* (Md.), 6 Gill & J. 205. In New Jersey, Mississippi, Wyoming, and South Carolina, the courts have held that it does not exist. *Freeholders* v. *State Bank*, 30 N. J. Eq. 311; *Anderson* v. *Mississippi*, 23 Miss. 459; *Commissioners* v. *Greenwood* (S. C.), 1 Desaussure 450; *State* v. *Foster* (Wyo.), 38 Pac. 926. See also *City and County of Denver* v. *Stenger* (C. C. A. 8 C.), 295 Fed. 809. Apparently the courts of the other States have not passed upon the question.

rationale of these cases is that property in receivership is not thereby rendered exempt from the operation of State tax laws, and that though State tax officials may not seize property in the possession of the federal courts for the purpose of satisfying taxes, it is the duty of the federal courts for that very reason and because of the relationship between the National and State governments to direct the prior payment of State taxes. That principle is equally applicable to federal taxes because of the relationship between and the coordinate rank of the judicial and executive branches of the federal government.

Indeed, individuals who have been deprived of summary processes for the collection of their claims because of the court's possession of the property of their debtors, have been given a similar priority. Thus landlords have been held to be entitled to priority of payment of their rent in receivership proceedings to compensate them for the loss of their remedy of distraint resulting from the court's custody of their tenant's property.[9]

In *Gaither* v. *Stockbridge,* 67 Md. 222, it was said (p. 226):

> In those cases where the goods of the lessee are remaining on the demised premises at or after the time when the rent becomes due, and the landlord seeks to exercise his right to distrain, and the only impediment to the

[9] See *In re Chauldron & Peyton* (D. C. Md.), 180 Fed. 841, 846; *Paine* v. *Sykes,* 72 Miss. 351; *Austin* v. *O'Reilly* (C. C. Miss.), 2 Woods 670, Fed. Cas. No. 665; *In re West Side Paper Co.* (C. C. A. 3 C.), 162 Fed. 110, 111; *Henderson* v. *Mayer,* 225 U. S. 631, 637.

> exercise of that right is the possession of the Court, by its receiver, it seems to be a settled rule of practice to order the receiver to pay the arrears of rent out of the proceeds of the property, or to permit the landlord to proceed with his distress, notwithstanding the possession of the receiver.

Chancellor Walworth said in *Noe* v. *Gibson* (N. Y.) 7 Paige 513, 515:

> Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent or that the landlord be at liberty to proceed by distress or otherwise as he may be advised.

There is no injustice involved in giving the Government priority for its taxes over general creditors in a case like this. When the receivership proceeding was instituted neither the Government and general creditors nor their respective claims stood on the same plane. The Government's taxes were of a higher order than the creditors' debts. Furthermore, the Government was in a preferred position with respect to its taxes. It had an inchoate lien therefor, and it had available to it summary administrative remedies for their collection, the application of which would have resulted in their priority of payment. The Government should not be deprived of these advantages by the institution

of the receivership proceedings. As the court said in *Jones* v. *Arena Publishing Co.*, 171 Mass. 22, 28, " It would be a plain injustice if a general creditor, by resorting to equity for the administration of its debtor's goods, merely for the reason that by its aid the amount to be derived would be larger, could gain a further advantage by reducing to the level of common creditors workmen, whose wages would have priority if the assets were left to be administered at law, or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity intervened."

III

Independently of statute, the United States were entitled to priority of payment of both the customs duties and the income tax involved in this case, because (A) priority of payment inheres in the very concept of a tax and (B) the right to priority of payment of taxes is an attribute of the sovereignty of the Government

A

Priority of payment is inherent in the concept of a tax

In levying taxes, the Government is exercising one of the greatest, the most important, and the most necessary of its sovereign powers. In *McCulloch* v. *Maryland*, 4 Wheat. 316, 428, Chief Justice Marshall said:

> It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which

> it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself.

In *Nicol* v. *Ames,* 173 U. S. 509, 515, the Court said of the power to tax:

> The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy but it is also the power to keep alive.

In 1 Cooley, Taxation (4th ed.), Sec. 57, the taxing power is thus described:

> The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the government requires contributions from them. * * * Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government, but instead merely constitute limitations upon a power which would otherwise be practically without limit.

A tax partakes of the lofty character of the great power of which it is the offspring. It rises to the height of its source. " A tax is a demand of sover-

eignty." *Case of the State Freight Tax,* 15 Wall. 232, 278. It is a civil obligation, not a personal convention. *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152, 160. A tax is not a debt. A debt is an obligation arising out of contract, express or implied. A tax is an impost levied for the support of the Government. The consent of the taxpayer is not necessary to its enforcement. It operates *in invitum. Meriwether* v. *Garrett,* 102 U. S. 472, 514; *Crabtree* v. *Madden* (C. C. A. 8 C.), 54 Fed. 426; *City of Camden* v. *Allen,* 26 N. J. L. 398.

Taxes are of higher order than debts, even than debts due the Government, and in respect to them the Government is not a creditor. *United States* v. *Eggleston* (C. C. Ore.), Fed. Cas. No. 15027; *cf. Food Controller* v. *Cork* [1923] A. C. 647. The Government's relation to its taxes is different from and superior to that of a creditor to a debt. *United States* v. *McHatton* (D. C. Mont.), 266 Fed. 602. In *State* v. *Rowse,* 49 Mo. 586, the court said of the liability for taxes (p. 592):

> The liability for them is not an ordinary one, and can not be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts.

Since the very existence of the Government depends upon the collection of the public revenue, the claim for taxes is paramount to all other claims

against the citizen. In *Jack* v. *Weiennett, supra,* the court recognized this to be true and said (p. 110):

> Before property can be protected, and the rights of creditors enforced, the State must have the means of subsistence. It can not perform its functions without them, and they can only be obtained through some system of taxation. *The claim for the payment of taxes upon the citizen is, therefore, of necessity paramount to all other claims against his property.* (Italics ours.)

In *Greeley* v. *The Provident Savings Bank, supra,* the court said (p. 460) that the State had a right paramount to other creditors to be paid its taxes out of receivership assets, and that in the administration and distribution of those assets it was the duty of the receiver "to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it."

In *Coy* v. *Title Guarantee Co.* (C. C. A. 9 C.), 220 Fed. 90, the court said (p. 92):

> It is too clear for argument that the appointment of a receiver and the taking of property into the hands of the court through its officer does not withdraw it from taxation. It remains subject to assessment and to payment of all legal taxes thereon while *in custodia legis,* to the same extent as it was while in the possession of the owner.

> And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected.

Thus, implicit in the nature of a tax is not only the right to promptness of payment, *Springer* v. *United States,* 102 U. S. 586, 594, but to priority of payment.

As Learned Hand, J., said below in this case in his concurring opinion in *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corporation* (C. C. A. 2 C.), 6 Fed. (2d) 752, 758:

> A tax is an exaction imposed by the sovereign for its own purposes, which we should assume to be of an importance paramount to the rights of an individual. Besides it does not presuppose, like a debt, any voluntary acceptance of the hazard of the taxpayer's continued solvency. Perhaps it is easier to deduce the priority from such considerations than to establish it by precedent. * * * Whatever may be the final upshot, it seems to me unnecessary for the present to go further than the facts at bar, or to say more than *the nature of a tax gives it, independently of statute, priority to debts due individuals,* certainly to such as sound in contract, and these are all we have now to consider. (Italics ours.)

Similarly, in *State of Minnesota* v. *Central Trust Co.* (C. C. A. 8 C.) 94 Fed. 244, the court said (p. 247):

> It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but it is an obligation which *by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority.* And in some well-considered cases the same priority has been accorded to a tax, although the statute imposing it failed to provide in so many words that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private contracts. * * * These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the State for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. (Italics ours.)

B

The right of priority of payment of taxes is an attribute of the sovereignty of the Government

Under the civil law, as well as the common law, and apparently without legislation, taxes were accorded priority of payment upon considerations of public policy. Colquhoun, Roman Civil Law, 396. As laid down in the Code of Justinian, C. XII, 62, 63, "*Utilitas publica praeferenda est privatorum contractibus.*" The right of the state to prior payment of the public revenue has been incorporated into the law of practically all modern countries, Sherman, Roman Law in the Modern World, Vol. II, § 364, so that it is not too much to say that in both of the great systems of jurisprudence, the English and the Roman, the sovereign was entitled to priority of payment of taxes as a necessary characteristic of sovereignty.

While the national Government is a government of delegated and enumerated powers, within the limits of those powers it has all the attributes of sovereignty. *In re Debs*, 158 U. S. 564; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 301. In the *Debs* case this Court said (p. 578):

> While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the

> exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

In *Kohl* v. *United States*, 91 U. S. 367, discussing the right of eminent domain, the Court said (p. 371):

> The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. * * * But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal Government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

As we have pointed out, one of the greatest of the sovereign powers of the Government is the power of taxation. Within the limits of that, as of its other powers, the Government has the fullest attributes of sovereignty. As Chief Justice White said in *United States* v. *Bennett*, 232 U. S. 299, 306, the Government's power of taxation "embraces all the attributes which appertain to sovereignty in the fullest sense."

If, then, the Government possesses the fullest attributes of sovereignty with respect to the power

of taxation, it follows that it is entitled *by virtue of its sovereignty alone* to priority of payment of the public revenue. For it is established by the decisions of this Court that if a right, privilege or immunity, which is universally recognized as a characteristic of sovereignty, accords with a sound public policy, promotes the general welfare, and is neither repugnant to the Constitution nor incompatible with the spirit of our institutions, it will be recognized as an attribute of the sovereignty of the United States. The right of priority of payment of the public revenue meets all those requirements. This Court has frequently pointed out the tokens by which sovereign attributes are known in our law.

In *United States* v. *Thompson,* 98 U. S. 486, the question was whether the United States were bound by a state statute of limitations. After referring to the principle that no laches can be imputed to the Government, this Court said (p. 489):

> *The United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition.* * * * The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. *These exemptions were founded upon considerations of public policy.* It was deemed important that, while the sovereign was engrossed by the cares and duties of his

> office, the public should not suffer by the negligence of his servants. " In a representative government, where the people do not and can not act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent." (Italics ours.)

In *United States* v. *Lee,* 106 U. S. 196, discussing the Government's immunity from suit, the Court said (p. 206):

> It seems most probable that it has been adopted by our courts *as a part of the general doctrine of publicists,* that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts. (Italics ours.)

In *Hill* v. *United States,* 9 How. 386, the question was whether the United States might be sued without their consent. The Court said (p. 389):

> *The question here propounded,* without any necessity for recurrence to particular examples, *would seem to meet its solution in the regular and best-settled principles of public law. No maxim is thought to be better established, or more universally assented to,* than that which ordains that a sovereign, or a government representing the sovereign, can not *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. (Italics ours.)

In *United States* v. *Kirkpatrick*, 9 Wheat. 720, the question was whether or not laches is imputable to the Government. In behalf of the Court, Mr. Justice Story said (p. 735):

> The general principle is, that laches is not imputable to the government; and *this maxim is founded, not in the notion of extraordinary prerogative but upon a great public policy.* The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. (Italics ours.)

In *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120, the question was whether or not the Government was bound by a statute of limitations. The Court said (p. 125):

> It is settled beyond doubt or controversy—*upon the foundation of the great principle of public policy, applicable to all governments alike,* which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, *asserting rights vested in them as a sovereign government,* are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. (Italics ours.)

In *The Siren,* 7 Wall. 152, the Court said (p. 153):

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. *The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule.* It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. *This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States.* (Italics ours.)

In *Gibson* v. *Chouteau,* 13 Wall. 92, the Court said (p. 99):

> It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and *was founded on the principle of public policy,* that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. *The principle is applicable to all governments,* which must necessarily act through numerous agents, and is essential to a pres-

ervation of the interests and property of the public. (Italics ours.)

The Government's reply to the petitioner's arguments

What are the arguments which would deny the Government the right to priority of payment of its taxes as an attribute of its sovereignty? It is not contended that the right does not rest upon the basis of universal recognition and consent, or that it is not equally applicable to all governments, or that it is not founded upon public policy, or that it does not promote the public welfare. In fact, the petitioner concedes that priority of payment of the public revenue accords with a sound public policy.

The prerogatives of the British Crown are not the source of the sovereign rights of the United States.

It is asserted that this Court has held that the Government did not inherit (*sic*) the British Crown's prerogative to prior payment of its ordinary debts; that the British Crown enjoyed a single prerogative right to priority of payment which extended to taxes as well as to its debts; and that since the Government did not inherit the prerogative in its one aspect it could not have inherited it in its other. Apparently, some international law of descent is invoked.

We have already demonstrated that the basic fallacy in this argument lies in the assumption that the only possible source of the Government's sover-

eign attributes is the royal prerogatives of the British Crown. We have shown that they have their origin in their universality, their conformity to a sound public policy, their tendency to promote the general welfare and their compatibility with our political institutions. Whence come other sovereign attributes of the United States? Whence come the sovereign attributes of the Roman Empire, of Germany, of France and of other civilized nations? Surely, these latter can not claim to be heirs of the Kings of England. Sovereigns all, are they therefore lacking in the attributes of sovereignty?

However, while the Government does not claim to be possessed of the right to priority of payment of its taxes as a *heritage* from the British Crown, there is nevertheless a solid foundation in the decisions of this Court for the proposition that the United States possess as sovereign rights those prerogatives of the kings of England, which the latter enjoyed as representatives of the English people and which are not incongruous with our republican form of Government.

For example, in *United States* v. *Thompson, supra,* this Court enumerated certain of the sovereign rights and immunities of the Government, and said with respect to them (p. 489):

> When the colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the national Constitution was adopted, *they*

> *were imparted to the new Government as incidents of the sovereignty thus created.* (Italics ours.)

In *Dollar Savings Bank* v. *United States,* 19 Wall. 227,[10] the Court said (p. 239):

> It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts.

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[10] The petitioner denies the binding force of this case on the authority of *Matter of In re Burrus,* 136 U. S. 586, in which the Court held that a District Court has no authority to issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grandparents. The Court approved and attached to its opinion the opinion delivered by Judge Betts in the Circuit Court, in which he held, in the language of this Court (p. 594), that "his court could not exercise the common law function of *parens patriæ.*" Of course, it is quite clear that Judge Betts was using the phrase *parens patriæ* in its very narrow and technical sense and in quite a different sense from that in which it was used, whether rightly or wrongly, in the *Dollar Savings Bank* case. Furthermore, the latter case has been cited approvingly in *Stanley* v. *Schwalby,* 147 U. S. 508, and in other cases decided after the *Burrus* case. *cf. Commonwealth of Ky.* v. *Dennison,* 65 How. 66, 97, where the Court, speaking of mandamus, said: "It undoubtedly came into use by virtue of the prerogative power of the English Crown * * *. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

It may be considered as settled that so much of the royal prerogatives as belong to the King in his capacity of parens patriæ, or universal trustee, enters as much into our political state as it does into the principles of the British constitution. (Italics ours.)

The Government should not be deprived of an attribute of its sovereignty, because the British Crown enjoyed a similar right in the form of a royal prerogative

But even if it be true that the prerogatives of the British Crown in its sovereign capacity did not, in whole or in part, enter as such into our political state, the question remains whether the United States, a sovereign government, are to be denied a universal attribute of sovereignty, which is founded upon public policy and is necessary to the general welfare, because, forsooth, the English sovereign had a similar right which fortuitously took the form of a royal prerogative. It has never before been supposed that great sovereign attributes are stigmatized by that accidental circumstance, or that they are thereby rendered anathema. The Government possesses many rights, privileges, and immunities which, as it happens, were also Crown prerogatives, but which are not repugnant to our institutions. In each case the question of repugnancy is for the Court's determination. *James* v. *Campbell,* 104 U. S. 356.

Thus, the United States are not bound by a statute unless named therein. They may not be sued

without their consent. Laches can not be imputed to them. They may sue in their own name on non-negotiable instruments assigned to them. They are not liable for the misfeasances or unauthorized acts of their agents. No judgment may be rendered against them for costs. A judgment in their favor can not be enjoined. No presumption of payment against them arises from lapse of time.

That these and other rights, privileges and immunities of the Government were likewise Crown prerogatives has always been regarded as immaterial, except as tending to show their applicability to all governments. That they were Crown prerogatives has never been considered a sufficient reason for abridging the sovereignty of the United States.

In *United States* v. *Hewes,* Crabbe, 307 Fed. Cas. No. 15359, the court held that the United States were not affected by an act of Congress because not named therein and said (p. 313):

> This may be called "prerogative," the prerogative of the crown or king. In England it is attached to the king, because he is the Sovereign of the country; but it is attached to the King as the sovereign power, wherever it may reside, and in that sense we may speak of prerogative without any repugnance to the principles of our Constitution, or the spirit of our institutions. It is nothing more than giving certain necessary rights or privileges to the whole community, which are denied to individual citizens on

> principles of public policy and expediency or the "general welfare." Many preferences of this sort, granted to the government, are found in our statutes, and no one has thought of branding them with any odium as "prerogatives."

In *United States* v. *Knight,* 14 Pet. 301, the Court held that the United States were not bound by a statute unless named therein, and said (p. 315):

> The same principle has been decided in New York, Massachusetts, Pennsylvania and, no doubt, in other states; and all upon the same ground. Not upon any notion of prerogative; for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute, for the public good; and the king represents the nation. *The real ground is a great principle of public policy, which belongs alike to all governments,* that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided. (Italics ours.)

In *United States* v. *Hoar,* 2 Mason 311, Mr. Justice Story pointed out that although the British Crown was not bound by a statute unless expressly named therein, the principle was equally applicable to this Government. He said (p. 313):

> *The true reason,* indeed, why the law has determined that there can be no laches or negligence imputed to the Crown, and, there-

> fore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his rights within the times limited to subjects), *is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit and equally applicable to all governments.*

The Government's right to priority of payment of its taxes need not have a statutory origin

The petitioner's argument is fallacious in other respects. It places undue reliance upon the cases of *United States* v. *Fisher,* 2 Cranch 358, *United States* v. *Bank of North Carolina,* 6 Pet. 29, and subsequent decisions of this Court. None of them is authority for the proposition that the Government's right of priority for taxes must have a statutory origin. In none of them was that right involved. In the *Fisher* case, for example, the question was whether the Government, as the holder of a bill of exchange, was entitled to be preferred to general creditors of the bankrupt debtor. That question depended upon the construction and constitutionality of the fifth section of the Act of March 3, 1797 (1 Stat. L. 515), the precursor of R. S. 3466. The Court held that the Act was broad enough to cover a debt due the United States on a

negotiable instrument and that it was constitutional. It was in connection with the latter question that the Court used the language (p. 395), upon which the petitioner places so much stress, "that under a constitution conferring specific powers, the power contended for must be granted, or it can not be exercised."

The power which the Court was discussing was not, as the petitioner intimates, the *right* to priority, but the *power* of Congress to pass a law dealing with priority. No basis can be found in the decision or logic in that or any subsequent case for the proposition that the Government's right to priority for taxes must be granted by the Constitution or by statute or, as the petitioner puts it, by the exercise of a delegated power. To admit that the Government, in common with all sovereigns, has that right, is not to enlarge its delegated powers. It is merely to acknowledge its sovereignty. The argument to the contrary overlooks the fact that by adopting the Constitution the States not only renounced a part of their powers but called into being a sovereign nation. Only its sovereignty explains its possession of numerous rights, privileges and immunities, some of which we have enumerated above, which are granted to it by the Constitution in no other sense than that by the Constitution it is made supreme. That sovereign attributes must be traceable to a specific constitutional or statutory provision is doctrine long since repudi-

ated. In *Boom Co.* v. *Patterson*, 98 U. S. 403, this Court said with respect to the sovereign right of eminent domain: "It requires no constitutional recognition; it is an attribute of sovereignty."

In the *Bank of North Carolina* case, also, the United States claimed priority of payment of a *debt*, not a *tax*, under the Act of 1797. As the Court said (p. 35), the claim did not stand upon any sovereign prerogative, but was "founded exclusively upon the actual provisions of their own statutes." The Court referred to the Crown prerogative only as an aid to the interpretation of the statute. It found that the policy of the prerogative might be traced into the statute, and held that since the policy of the prerogative had "mainly a reference to the public good," the statute should receive no strict construction.

In *United States* v. *Canal Bank*, Fed. Cas. No. 14715, the question involved was whether the Government had priority for a *debt*, not a *tax*, for which it had attached property of the debtor, as against other creditors whose attachments were of an earlier date. It was in connection with that problem and on the basis of the *Fisher* and similar cases that the court said (p. 278) that it had long been settled by the decisions of this Court "that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the *debts* due to them, founded upon any general prerogative, belonging to the Government

in its sovereign capacity." Of course, taxes were not in the court's mind. Nevertheless, the petitioner makes that language the basis of a contention that since there was a single prerogative right which extended to debts and taxes alike, the Government can not possess one branch of it since it does not possess the other.

The fact that the Government has no sovereign right to priority of payment of its debts is immaterial

The argument has obvious weaknesses. It overlooks the intrinsic difference between debts and taxes and the paramount importance of the latter. It assumes that the Government must possess the right which it claims, if at all, by way of the royal prerogative, an assumption which we have already shown to be unfounded. It attributes to the prerogative a quality of indivisibility which the House of Lords seems disposed to deny to it. In *Food Controller* v. *Cork* [1923] A. C. 647, priority was sought as a prerogative right for the purchase price of personal property which a government agency had sold a corporation that was being wound up under the Companies Act of 1908. The House of Lords held that that Act and other statutes in *pari materia* had cut down the royal prerogative in cases to which they applied, and that under them the Crown was entitled to priority only for taxes. However, several of the law Lords took occasion to question that a debt of the kind involved in the

case was longer included within the scope of the royal prerogative of priority.

For example, in the course of his opinion in the *Cork* case, Lord Shaw of Dunfermline, speaking of *Commissioners of Taxes for New South Wales* v. *Palmer* [1907] A. C. 179, which is cited by the petitioner at page 12 of his brief, said (p. 666):

> My Lords, I venture to interpose much doubt as to the application or extension of the expression used by Macdonald C. B., "that where the King's and the subject's title concur the King's shall be preferred," and the modernization of it given by Lord Macnaghten, to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on. * * * But if the propositions above cited should ever be used to justify or widen the royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realize that this dictum of Lord Macnaghten's occurred in a case in which the nature of the debts, as Crown debts, and that in a very strict sense, was clear beyond all question. The claim of the Crown in the *Palmer Case* was in respect of "the sum of 53 l. for land and income tax and fine, * * *." There, accordingly, the Crown debt was clear as such and as being within a definite sphere of action plainly within the law applicable to the royal prerogative.

He then pointed out the character of the debt involved in the *Cork* case and said (p. 667):

> My opinion is now delivered with the most complete reservation of the point whether facts of such a nature could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the royal prerogative.
>
> How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. * * * The debt arises purely in commercio.

Thus, while the highest court in England exhibits a tendency so far to divide the royal prerogative as to allow the Crown priority for taxes but to deny it preference for debts, the petitioner argues that the Government has no sovereign right of priority for taxes because it has none for debts. The petitioner refuses to see the difference in policy between the two priorities which this Court saw a century ago and which is now manifest to the English courts.

American courts, also, have recognized the divisible character of the royal prerogative. *Baxter* v. *Baxter,* 23 S. C. 114, 118. In *State* v. *Rowse, supra,* the Court said (p. 592):

> By the common law all debts due the Crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. * * * If the claim

of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject.

Furthermore, even if it were true that the royal prerogative for debts and taxes rested alike upon the maxim enunciated by Lord Coke in Quick's case (1604), 9 Rep. 129a: "*Quando jus domini regis et subditi concurrent jus regis praeferri debit,*"[11] the inapplicability of the maxim to our form of Government would mean nothing. In several instances this Court has recognized that the Government has attributes of sovereignty which the Crown enjoyed as royal prerogatives, although the reasons out of which the prerogatives sprang are not consonant with American political philosophy.

[11] The Crown's prerogative of priority did not originate in Lord Coke's maxim, which was simply his rationalization of a right which had long existed as one of the privileges which the king had in common with lesser feudal lords. It originated in connection with the king's feudal dues, which were, of course, in the nature of taxes, apparently long before any tax, except the Danegeld, was known in England. Later it was naturally extended to taxes. Similarly, by the extension of old and the invention of new prerogatives the various powers of the developing English state were accounted for. Thus, almost every power of government was once embodied in the mass of royal prerogatives. In the constitutional struggles of the 17th century most of them were diverted to the King in Parliament. They then ceased to be known as prerogatives and became ordinary powers of government, such as the power to levy taxes. However, for historical reasons, the right to priority of payment of taxes continued to be known as a prerogative in common with other procedural rights. 2 Holdsworth, History of English Law, 458 *et seq.*; 4 id. 22 *et seq.*; 1 Bl. Com. (Lewis Ed.), 239 *et seq.*

United States v. *Hoar, supra; Langford* v. *United States,* 101 U. S. 341; *Gibbons* v. *United States,* 8 Wall. 269.

In the *Langford* case the Court pointed out that the maxim of English constitutional law that the King can do no wrong is not applicable to our institutions. That maxim, however, is the foundation of the immunity of the British Crown from suit, an immunity which this Government also possesses.

The fact that the Government has never adopted the common law is immaterial

Other arguments of the petitioner may be briefly noted. The argument that the Government does not have the sovereign attribute which it claims, because it never adopted the common law[12] as the foundation of its jurisprudence, involves the same unwarranted assumption, to which we have several times referred, that the Government must find the source of its sovereign attributes in the royal prerogatives. Pushed to its logical conclusion, the argument would deny to the United States any qualities of sovereignty except those specifically enumerated in the Constitution or in statutes, and yet, as we have pointed out, it has many rights, privileges and immunities merely because it is sovereign. The petitioner misses the point entirely when he contends that the possession by the Government of other sovereign attributes does not prove

[12] This general proposition is, of course, subject to exceptions. *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92, 101; *Smith* v. *Alabama*, 124 U. S. at p. 478.

the existence of a right to priority for taxes. Of course, it does not, but it does prove that if a given attribute of sovereignty, whether it be the right to priority for taxes or some other, is based on a sound public policy, tends to promote the public welfare, and is compatible with our political institutions, it is an attribute of American as well as of other sovereignties, although we have neither inherited the Crown's prerogatives nor adopted the common law.

R. S. 3466 does not measure the Government's right to priority for taxes

The petitioner also contends that R. S. 3466 defines the limits of the Government's priority for taxes. His argument involves the application of the maxim of express mention and implied exclusion. There can be little doubt, after what we have said, that when Congress passed the Act of March 3, 1797 (1 Stat. L. 515), the fifth section of which eventually became R. S. 3466, the Government was entitled as a matter of right to priority of payment of its taxes. No case can be found in which that right had theretofore been questioned. The maxim upon which the petitioner relies is therefore inapplicable here. *Shurtleff* v. *United States,* 189 U. S. 311. Even if the Act of 1797 applied to taxes as well as to debts, it was clearly not the legislative intention to limit the Government's priority for taxes to the instances enumerated in that Section.

It is quite evident that the primary purpose of Section 5 of the Act of 1797 was to create a pref-

erence for *debts* due the United States arising out of duty and tax bonds and from receivers of public money. *United States* v. *Fisher, supra.* That is shown by the language of earlier statutes,[13] by the title and provisions of the Act of 1797,[14] and by the fiscal system in existence when it was passed. At that time import duties were the chief source of public revenue. Internal revenue played only an insignificant part in the fiscal system of the day.[15] However, in the case of every duty and in the case of every tax except one[16] the taxpayer could at his option either pay the impost or secure its payment by bond. Doubtless, the instances in which the taxpayer did neither, were rare, so that unpaid duties and taxes were usually secured by bonds. However, existing statutes provided only for the priority of debts arising out of duty bonds. There was none for those arising out of tax bonds or the receipt of public money.

To meet that situation the Act of 1797 created priority in every case for debts due the Government by " any revenue officer, or other person here-

[13] Act of July 31, 1789, § 21, 1 Stat. 29; Act of August 4, 1790, § 45, 1 Stat. 145; Act of May 21, 1792, § 18, 1 Stat. 259.

[14] "An Act to provide more effectually for the settlement of accounts between the United States and the receivers of public money."

[15] Prior to March 3, 1797, internal taxes had been levied in only five cases. By the Act of March 3, 1791 (1 Stat. 203, 204), duties were laid on distilled spirits and private stills; by the Act of June 5, 1794 (1 Stat. 373, 376, 384), on carriages for the conveyance of persons, on licenses for selling wines, etc., and on snuff and refined sugar; and by the Act of June 9, 1794 (1 Stat. 397), on property sold at auction.

[16] The tax on carriages for the conveyance of persons levied by the Act of June 5, 1794, 1 Stat. 373.

after becoming indebted to the United States, by bond or otherwise." It is perfectly clear, therefore, that taxes were only remotely, if at all, in the legislative consciousness. Debts were uppermost, if not exclusively, in the legislative mind. It is true that these were debts arising in connection with the public revenue, but they were nevertheless debts. If the statute covers taxes it does so only incidentally and only because it contains general terms which may be sufficiently broad to comprehend every kind of obligation owing to the Government. The statute nowhere mentions taxes. It is interesting to note that the compilers of the Revised Statutes placed R. S. 3466 in the chapter of the Revised Statutes dealing with debts rather than in the chapter dealing with taxes.

Under the circumstances it seems clearly unreasonable to impute to the Congress which passed the Act of 1797, an intention to make that Act the sole measure of the Government's priority for taxes. That result can only be reached by employing the maxim of express mention and implied exclusion to defeat rather than to ascertain the legislative intent. As said in *Colquhoun* v. *Brooks*, 19 Q. B. Div. 406, the maxim is " often a valuable servant but a dangerous master to follow in the construction of statutes and documents. The ' exclusio ' is often the result of inadvertence or accident * * *."

The absence of any legislative intent to make the Act of 1797 exclusive is shown by its saving clause, Section 7, which provides:

> And be it further enacted, that nothing in this Act shall be construed to repeal, take away, or impair any legal remedy or remedies for the recovery of debts, now due, or hereafter to be due to the United States, in law or in equity, from any person or persons whatsoever, which remedy or remedies might be used if this Act were not in force.

CONCLUSION

The question for decision in this case is one of first impression in this Court. It is not only difficult but important, involving as it does the public revenue. Neither formula nor authority points unerringly to its solution. Counsel for the Government would be less than frank with the Court if they should contend otherwise. Neither party to this controversy may claim an exclusive alliance with logic. However, the logic of the argument that would deny the Government priority in the payment of the public revenue is dry and artificial, concerned only with premises and other syllogistic requirements, whereas the logic of the Government's position takes into consideration the essential character and paramount importance of a tax and reaches a conclusion which accords with the dictates of a public policy so sound that it is recognized throughout the civilized world. Unham-

pered by binding precedents, this Court is free to fashion the law upon the pattern of public necessity and the general welfare.

The decree appealed from should be affirmed.

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